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PIIN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NOS. 42758 & 42759
Plaintiff-Respondent,)	
)	ADA COUNTY NOS. CR 2013-18132 &
v.)	CR 2014-1189
)	
CESAR ANTONIO)	APPELLANT'S BRIEF
SEPULVEDA,)	
)	
Defendant-Appellant.)	

BRIEF OF APPELLANT

COPY

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA

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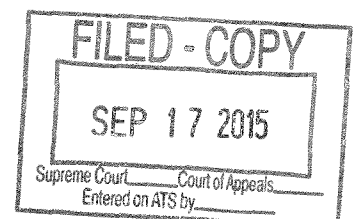


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STATEMENT OF THE CASE

Nature of the Case

Cesar Sepulveda appeals contending that three of his constitutional rights have been violated. First, he asserts his right to confront witnesses against him was violated when the district court granted the State's motion to present the preliminary hearing testimony of the alleged victim, L.M., during his trial, as a result of her untimely, unrelated death. Specifically, he asserts that he was not afforded an adequate, full, and fair opportunity to cross-examine her during the preliminary hearing. As such, his convictions based on that improperly-presented testimony should be vacated.

Second, Mr. Sepulveda contends his right to present a defense was violated when the district court determined the evidence of L.M.'s history of drug use was irrelevant, and thus, prevented him from presenting a full defense to the jury. That evidence was relevant to L.M.'s credibility, bias, and motive in testifying. Thus, the order sustaining the prosecutor's relevance objection to the cross-examination of L.M. on her history of drug use (adopted by the district court when it allowed the preliminary hearing testimony to be admitted as evidence) is erroneous. Similarly, the pretrial determination that the nature of L.M.'s death – overdose on methamphetamine – was irrelevant was also erroneous. As such, those decisions should be reversed and the convictions based on those rulings should be vacated.

Third, Mr. Sepulveda contends that his right to be free from double jeopardy under the Idaho Constitution was violated when the district court entered convictions and imposed sentence for the charges in the 2014 case. Specifically, he asserts that, under Idaho's pleading theory, the allegations in the Information in the 2014 resulted in one charge (attempting to influence a witness) being the means by which each of the

other two (attempting to violate a no contact order) were committed. He also asserts that this rises to the level of fundamental error, and so, those convictions should be vacated.

Mr. Sepulveda also contends that, even if this Court determines these errors to be independently harmless, cumulatively, they demonstrate he was deprived of his right to a fair trial. In that case, this Court should still vacate his convictions.

For any and all of these reasons, this Court should vacate Mr. Sepulveda's convictions and remand these cases for further proceedings.

Statement of the Facts and Course of Proceedings

When officers responded to a neighbor's report of domestic violence, Mr. Sepulveda, sporting visible injuries and blood, opened the door. (Presentence Investigation Report (*hereinafter*, PSI), pp.127-28¹; Tr., Vol.1, p.25, Ls.10-11, p.27, Ls.14-18.²) Officer Wudracki conducted a pat search of Mr. Sepulveda. (PSI, p.127.) As he did so, Mr. Sepulveda told Officer Wudracki that he had L.M.'s methamphetamine pipe and a baggie of methamphetamine that he had found in the house in his pocket. (PSI, pp.127-28.) He stated that, when he had found those items, he had confronted L.M. about her drug use and she had responded by assaulting him. (PSI, p.128.) He

¹ PSI page numbers correspond with the page numbers of the electronic PDF file "Sepulveda 42758 psi." Included in this file are the PSI report and all the documents attached thereto, such as the police reports.

² The transcripts in this case are provided in four independently bound and paginated volumes. To avoid confusion, "Vol.1" will refer to the volume containing the transcript of the preliminary hearing in CR 2013-18132 (*hereinafter*, 2013 case). "Vol.2" will refer to the volume containing the transcript of the preliminary hearing in CR 2014-1189 (*hereinafter*, 2014 case). "Vol.3" will refer to the volume containing the transcripts of the pretrial hearings held on June 20, 2014, July 25, 2014, and August 8, 2014. "Vol.4" will refer to the volume containing the transcripts of the jury trial and the sentencing hearing.

also provided other explanations for his injuries, which he later admitted were attempts to protect L.M. from being arrested. (PSI, p.128; Tr., Vol.4, p.366, Ls.7-24.)

Inside, Officer Chally spoke with L.M. (PSI, p.96.) L.M. maintained that there had been no physical violence by either Mr. Sepulveda or herself. (PSI, p.96.) Officer Chally felt that L.M. was attempting to downplay the incident to get the officers to leave. (Tr., Vol.4, p.208, Ls.15-19.) After consulting with Officer Wudracki, Officer Chally went back to L.M., relayed what Mr. Sepulveda had said, and told L.M. that she would be going to jail unless she told Officer Chally what really happened. (PSI, pp.96-97; Tr., Vol.4, p.212, Ls.4-8.) At that point, L.M. accused Mr. Sepulveda of attempting to strangle her. (PSI, p.96.) Officers then arrested Mr. Sepulveda. (PSI, p.116.) Mr. Sepulveda was ultimately charged, in the 2013 case, with attempted strangulation and injury to a child based on accounts that three of their children were present during the fight between L.M. and Mr. Sepulveda. (R., pp.56-58.) A no contact order was entered prohibiting Mr. Sepulveda from contacting L.M. (See, e.g., Tr., Vol.4, p.389, Ls.6-8 (Mr. Sepulveda admitting the existence of the no contact order).)

Thereafter, a new case was filed alleging Mr. Sepulveda had placed calls from the jail asking two different people to contact L.M. on his behalf. (R., pp.277-79.) Specifically, the charges alleged:

COUNT I

That the Defendant, Cesar Antonio Sepulveda, on or between the 29th day of December, 2013[,] and the 14th day of January, 2014, in the County of Ada, State of Idaho, did willfully intimidate, influence, impede, deter, obstruct, or prevent, and or did attempt to intimidate, influence impede, deter, obstruct, or prevent [L.M.], a witness, potential, witness, and/or person the Defendant believes to be a witness, from testifying freely, fully, and truthfully in a criminal proceeding, to-wit: [the 2013 case] by asking another person and/or persons to speak with [L.M.] and ask her to tell the court that she injured herself, that the allegations of attempted strangulation are false, and/or that her medications are to blame for what happened, and/or to direct her not to appear for court.

COUNT II

That the Defendant, Cesar Antonio Sepulveda, on or about the 30th day of December, 2013, in the County of Ada, State of Idaho, attempted to have contact with [L.M.] in violation of a no contact order issued in [the 2013 case] by calling [L.M.]'s sister and asking her to pass certain messages on to [L.M.].

COUNT III

That the Defendant, Cesar Antonio Sepulveda, on or about the 30th day of December, 2013, in the County of Ada, State of Idaho, attempted to have contact with [L.M.] in violation of a no contact order issued in [the 2013 case] by calling a Lisa Cameron and asking her to contact [L.M.] on his behalf.

(R., p.278.) The cases were ultimately consolidated. (See R., p.41.)

L.M. testified at the preliminary hearing in the 2013 case. At the end of the direct examination, the prosecutor asked her:

Q. I'm going to ask you a question that seems a little bit out of line here, but bear with me. Had you used methamphetamine that day?

A. No.

Q. Okay. Did you have a pipe on your person that day?

A. No.

(Tr., Vol.1, p.16, Ls.1-7.) On cross-examination, defense counsel attempted to explore this issue further, asking: "Now, you said you hadn't used any methamphetamine that day. Had you a few days prior to that?" (Tr., Vol.1, p.17, Ls.7-9.) However, the prosecutor objected on grounds of relevance, and the magistrate sustained that objection. (Tr., Vol.1, p.17, Ls.11-16.) A similar objection was sustained in regard to defense counsel's attempt to inquire about L.M.'s history of self-abuse. (Tr., Vol.1, p.16, Ls.18-22.) However, unlike with the objection to L.M.'s history of drug use, defense counsel was offered the opportunity to lay additional foundation in regard to the line of questioning on L.M.'s history of self-abuse. (*Compare* Tr., Vol.1, p.16, L.18 - p.17, L.1; *with* Tr., Vol.1, p.17, Ls.7-18.)

Unfortunately, in the interim between the preliminary hearing and the jury trial, L.M. overdosed on methamphetamine and passed away. (See, e.g., Tr., Vol.4, p.11, L.21 - p.12, L.9.) As a result, the prosecutor filed a motion requesting she be allowed to present L.M.'s preliminary hearing testimony to the jury. (R., pp.312-23.) Mr. Sepulveda objected, contending that he had not been afforded an adequate opportunity to cross-examine L.M. about issues impacting on her credibility, namely her history of drug use and her history of self-abuse. (Tr., Vol.3, p.27, L.1 - p.32, L.5.) The district court determined, in regard to the line of questioning about L.M.'s history of self-abuse, defense counsel had been offered the opportunity to lay more foundation to show the relevance of that question, but had decided not to take advantage of that opportunity. (Tr., Vol.3, p.35, L.24 - p.36, L.12.) It did not make any particular ruling as to the line of questioning about L.M.'s history of drug use. (See *generally* Tr., Vol.3, p.34, L.5 - p.37, L.11 (the court's explanation of its decision); Tr., Vol.3, p.38, L.23 - p.40, L.3 (clarification of the decision at Mr. Sepulveda's request).) As such, it granted the State's motion and allowed it to present the unredacted audio recording of L.M.'s preliminary hearing testimony. (Tr., Vol.3, p.37, L.11 (granting the motion to use the preliminary hearing testimony); Tr., Vol.3, p.51, L.6 - p.52, L.23 (discussing the procedure for admitting the preliminary hearing testimony); *compare* State's Exhibit 3 (the audio recording); *with* Tr., Vol.1, p.1, L.7 - p.21, L.18 (the transcript of L.M.'s preliminary hearing testimony).)

The prosecutor also moved to exclude any reference to the cause of L.M.'s death during the trial. (R., p.386 ("Motion in Limine Regarding the Suicide of [L.M.]").) Mr. Sepulveda objected insofar as the cause of death – overdose on methamphetamine – was relevant to his theory of defense:

Well, Your Honor, there's other evidence that she, at the time of this incident, had methamphetamine in her system and other drugs that weren't prescribed to her. So it's a common theme that on our side that perhaps if she were here, we would [be] tempted to expose that. And so it does relate to this case, where she has a continued struggle with drug abuse, and that goes to the weight of her testimony.

(Tr., Vol.4, p.13, L.20 - p.14, L.4.) The district court granted the State's motion over Mr. Sepulveda's objection. (Tr., Vol.4, p.14, L.21 - p.15, L.7.) However, it did agree to instruct the jury that L.M.'s death was unrelated to the issues pending in the trial. (See Tr., Vol.4, p.137, L.20 - p.138, L.2 (the instruction to the jury regarding L.M.'s death).)

During the trial, Mr. Sepulveda was ultimately allowed to present some evidence as to L.M.'s mental health issues. (See *generally* Tr., Vol.4, p.322, L.11 – p.333, L.7 (testimony of Stacy Wright, L.M.'s counselor, as to L.M.'s symptoms of suicidal and homicidal ideations reported to Ms. Wright a few days before the incident with Mr. Sepulveda).) Additionally, during redirect of his testimony, Mr. Sepulveda was allowed to offer some evidence about L.M.'s drug use. (Tr., Vol.4, p.419, L.2 - p.421, L.17 (discussing the resolution of a series of objections addressed at side bar, whereby the evidence was determined to be admissible as the parties opened the respective doors to those facts).)

During deliberations, the jury sent out several questions, including one which asked: "If an aggressor is choked by someone who is defending themselves, is the choking -- it actually says caulking but I'm sure it means choking -- a violation of the law?"³ (Tr., Vol.4, p.483, Ls.9-12.) The jury ultimately acquitted Mr. Sepulveda of the attempted strangulation, convicting instead on the lesser included misdemeanor of

³ Some documents, such as the question sheets sent by the jury during deliberations, are missing from the record. Efforts to get copies of these documents from the district court are ongoing, and Mr. Sepulveda will file a motion to augment the record with those documents once they are received.

domestic battery. (R., p.404.) It convicted him as charged on the remaining counts. (R., pp.404-05.)

At the sentencing hearing, defense counsel noted that Mr. Sepulveda was facing potential deportation as a result of the felony conviction (intimidating a witness). (Tr., Vol.4, p.511, Ls.20-24.) The district court ultimately sentenced Mr. Sepulveda to a unified term of five years, with three years fixed for the felony conviction and concurrent six-month sentences for each of the misdemeanors. (R., pp.235, 457-58; Tr., Vol.4, p.521, L.20 - p.522, L.19.) It also retained jurisdiction. (R., p.458.) Mr. Sepulveda filed notices of appeal timely from the judgments of conviction. (R., pp.236-38, 463-65.)

ISSUES

1. Whether the district court violated Mr. Sepulveda's constitutional right to confront the witnesses against him when it granted the State's motion to present L.M.'s preliminary hearing testimony during trial even though he had not been afforded an adequate opportunity to cross-examine L.M.
2. Whether the district court violated Mr. Sepulveda's right to present a defense by not allowing him to present evidence challenging L.M.'s credibility based on its erroneous conclusion that the evidence was irrelevant.
3. Whether the district court violated Mr. Sepulveda's constitutional right to be free from double jeopardy under the Idaho Constitution by entering convictions and imposing sentences for each charge in the 2014 case when one of those charges was alleged as the means by which each of the other two charges was committed.
4. Whether the accumulated errors in this case require reversal even if this Court determines them to be individually harmless.

ARGUMENT

I.

The District Court Violated Mr. Sepulveda's Constitutional Right To Confront The Witnesses Against Him When It Granted The State's Motion To Present L.M.'s Preliminary Hearing Testimony During Trial Even Though He Had Not Been Afforded An Adequate Opportunity To Cross-Examine L.M.

The Sixth Amendment of the United States Constitution provides that a criminal defendant has “the right . . . to be confronted with the witnesses against him.” U.S. Const. amend VI. This protection means that a witness’s testimonial statements will not be admissible as evidence at trial unless that witness is subjected to cross-examination. *See, e.g., Crawford v. Washington*, 541 U.S. 36, 53-54 (2004); *State v. Richardson*, 156 Idaho 524, 528 (2014). When the State proposes to introduce the preliminary hearing testimony of a witness at trial, the statements are undoubtedly testimonial. *Id.* Thus, preliminary hearing testimony may only be used at a subsequent trial if the defendant was afforded an adequate opportunity to cross-examine that witness. *Richardson*, 156 Idaho at 528; *State v. Mantz*, 148 Idaho 303, 305-07 (Ct. App. 2009) (tracing the decisions which provide that the opportunity to cross-examine must be a full, fair, and adequate opportunity.)

The determination of whether the defendant has been provided an adequate opportunity to cross-examine a witness during a preliminary hearing is dependent on the circumstances of each individual case. *See Mantz*, 148 Idaho at 307-10. One of the considerations is whether the scope of the defendant’s inquiries is significantly limited by the magistrate. *Mantz*, 148 Idaho at 306 (discussing the decision in *California v. Green*, 399 U.S. 149, 166 (1970), which recognized this factor). This means that the defendant should not be prevented from questioning the witness about potential sources of bias or attacking the veracity of the witness’s direct testimony:

“Where the defendant has had the opportunity to cross-examine a witness at a preliminary hearing, probing into areas such as bias and testing the veracity of the testimony, cross-examination, and thus, confrontation, within the meaning of the Sixth Amendment has been accomplished.” *Richardson*, 156 Idaho at 529 (quoting *Commonwealth v. Wholaver*, 989 A.2d 883, 904 (2010)). This is because the purpose of the Confrontation Clause is “that reliability [of testimony] be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence . . . , but about **how** reliability can best be determined.” *Crawford*, 541 U.S. at 61-62 (emphasis added). Thus, as the United States Supreme Court has long since explained, “[c]onfrontation . . . forces the witness to submit to cross-examination, the ‘greatest legal engine ever invented for the discovery of the truth.’” *Mantz*, 148 Idaho at 306 (quoting *Green*, 399 U.S. at 158 (quoting 5 Wigmore § 1367)).

To that point, “the exposure of a witness’ motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.” *State v. White*, 97 Idaho 708, 713 (1976). As such, in *Mantz*, the defendant had been permitted to question the witness “as to the accuracy of his story, [his] underage drinking, [his] desire for an adventure, [his] ability to recall the events of the evening due to alcohol consumption, and [his] motive [to testify falsely] due to the pressure he was under from his parents and the DUI [charge he was facing].” *Mantz*, 148 Idaho at 310-11. Therefore, although the prosecutor’s objection as to the relevance of a particular question may have been upheld, the defendant was not deprived of an adequate opportunity to cross-examine the witness at the preliminary hearing. *Id.*

Similarly, in *Richardson*, the defendant was not deprived of an adequate opportunity to cross-examine the witness because:

Richardson questioned Bauer on all relevant issues for cross-examination at trial: Bauer's recollection of the events in question, his agreement with the State to be a confidential informant in exchange for non-prosecution, his prior felony conviction, his drug addiction, and his relationship with Richardson. With these questions, Richardson inquired into Bauer's potential bias, his motive to testify falsely, the reliability and accuracy of his recollection of the controlled deliveries, and his credibility.

Richardson, 156 Idaho at 529. Furthermore, the defendant in that case had not offered "any evidence of new and material information that he would have confronted Bauer with at trial." *Id.* at 529-30; *cf. Matnz*, 148 Idaho at 307 (discussing the holding in *Mancusi v. Stubbs*, 408 U.S. 204, 214 (1972), which identified this same factor)). Thus, although the cross-examination may not have been as detailed as the defendant in *Richardson* would have preferred, he still received an adequate opportunity to cross-examine the witness as required by the Confrontation Clause. *Richardson*, 156 Idaho at 529-30.

However, unlike the defendants in *Richardson* and *Mantz*, Mr. Sepulveda was not afforded the opportunity to question L.M. about potential sources of bias or motives to testify falsely. Notably, L.M. was asked on direct examination:

Q. I'm going to ask you a question that seems a little bit out of line here, but bear with me. Had you used methamphetamine that day?

A. No.

Q. Okay. Did you have a pipe on your person that day?

A. No.

(Tr., Vol.1, p.16, Ls.1-7.) As L.M. was the first witness to testify at the preliminary hearing, these questions could only be meant to preempt certain questions the prosecutor expected the defense to ask L.M. This is unsurprising as the police reports stated that officers had found a pipe and methamphetamine on Mr. Sepulveda, which

he had said actually belonged to L.M., and that, when he confronted her about her drug use, she physically assaulted him. (PSI, pp.127-28 (Officer Wudracki's report).) Officer Chally also testified that she felt L.M. was trying to downplay the whole situation in an attempt to get the officers to go away. (Tr., Vol.4, p.208, Ls.15-19.) She also noted a white film at the corners of L.M.'s mouth (Tr., Vol.4, p.205, Ls.8-10; see, e.g., State's Exhibit 13 (picture of L.M. which shows the white film).) Based on all that information, as well as the fact that Mr. Sepulveda showed visible injuries, Officer Chally told L.M. she would be going to jail. (Tr., Vol.4, p.212, Ls.4-8.) It was at that point that L.M. made accusations against Mr. Sepulveda; to that point, she had denied there was any physical contact by either of them. (PSI, pp.96-97.)

As such, there were several significant points that the prosecutor would have justifiably expected defense counsel to explore regarding L.M.'s credibility, bias, and motive on cross-examination. After all, as the Idaho Supreme Court has pointed out: "The partiality of a witness is subject to exploration at trial, and is '**always relevant**' as discrediting the witness and affecting the weight of his testimony.'" *White*, 97 Idaho at 713 (quoting "3A J. Wigmore, Evidence s 940, p.775 (Chadbourn rev. 1970)") (emphasis added).

When defense counsel started to do precisely that and follow up on L.M.'s denial regarding using methamphetamine,⁴ the prosecutor, despite having asked L.M. about prior methamphetamine use herself, objected as to relevance of the inquiry. (Tr., Vol.1, p.17, Ls.7-16.) The magistrate sustained that objection. (Tr., Vol.1, p.17, L.16.) Unlike

⁴ Defense counsel later explained that there was, in fact, evidence that L.M. had methamphetamine in her system the day of the incident despite L.M.'s denial of using methamphetamine on direct examination. (*Compare* Tr., Vol.4, p.13, Ls.20-23; *with* Tr., Vol.1, p.16, Ls.1-7.)

the State's previous objection to a question about L.M.'s history of self-abuse, Mr. Sepulveda was not invited to lay more foundation to try and show the relevance of his inquiry in to L.M.'s history of drug abuse. (See Tr., Vol.1, p.16, L.18 - p.17, L.18.) As such, the magistrate's ruling prevented Mr. Sepulveda from questioning L.M. about this source of bias and motive to testify falsely against him. This was erroneous, as the Idaho Supreme Court has expressly held that cross-examination into the witness's drug history as a source of potential bias is a relevant inquiry and the presence of such an inquiry indicates that the opportunity to cross-examine was adequate. *Richardson*, 156 Idaho at 529 (noting that the defendant was allowed to cross-examine the witness on "his drug addiction"); *see also Mantz*, 148 Idaho at 310-11 (indicating that the fact that the defense had been allowed to ask questions about the witness's history of underage drinking indicated the opportunity for cross-examination had been adequate).

Additionally, defense counsel made an offer of proof as to the new material he would have confronted L.M. with at trial. He explained that L.M.'s preliminary hearing testimony had involved denying the use of meth and "we weren't able to explore that further and perhaps develop more of a credibility issue." (Tr., Vol.3, p.29, Ls.18-23.) The district court did not address that issue at all in granting the State's motion to use the preliminary hearing testimony.⁵ (See *generally* Tr., Vol.3, p.34, L.4 - p.37, L.11;

⁵ The district court's decision focused on defense counsel's primary offer of proof – that, had they L.M.'s medical records, or, at least, adequate time and understanding of the contents thereof, they would have been able to develop a line of impeachment with L.M. regarding her mental health symptoms, which led to suicidal and homicidal ideations. (See *generally* Tr., Vol.3, p.27, L.1 - p.28, L.25 (defense counsel's offer of proof regarding the medical records).) The district court determined that, in that regard, defense counsel had been offered the opportunity to lay more foundation to show the relevance of that line of inquiry and decided to pursue an alternative line of cross-examination. (Tr., Vol.3, p.35, L.22 - p.36, L.12.) However, there was no such opportunity to lay more foundation regarding L.M.'s drug issues; that line of inquiry was completely shut down. (See Tr., Vol.1, p.17, Ls.7-16 (the objection to L.M.'s drug

Tr., Vol.3, p.38, L.23 - p.40, L.3.) Defense counsel subsequently added that there was evidence that L.M. had methamphetamine and other unprescribed drugs in her system on the day of the incident. (Tr., Vol.4, p.13, Ls.20-23.) Thus, unlike *Richardson*, there was evidence of the lines of questioning that would have been pursued, but which the defense was not allowed to pursue in the preliminary hearing. This further demonstrates that the opportunity to cross-examine L.M. at the preliminary hearing was not adequate to satisfy the Confrontation Clause's requirements.

Rather, this case is more like *White*, where “[t]he trial judge . . . cut off appellant’s cross-examination on an important credibility issue before the issue could be properly developed.” *White*, 97 Idaho at 713. The Idaho Supreme Court held that this “was error.” *Id.* The Idaho Supreme Court also explained that the fact the defendant had been subsequently allowed to explore the issue to some extent during the trial was not sufficient to cure that error: “At the time defense counsel was stopped by the trial judge, he had elicited the fact of the strain in the relationship, but had not explored the extent of the strain, **nor the effect of the strain on [the witness’s] perception and motivations.**” *Id.* at 713 n.6 (emphasis added). Rather:

While defense counsel later did again refer to the existence of a strain he was never allowed to develop that point. The standard for review of a denial of a confrontation right was set forth in *Davis v. Alaska*, [415 U.S. 308 (1974)]: “Petitioner was thus denied the right to effective cross-examination which ‘would be constitutional error of the first magnitude and no showing of want of prejudice would cure it.’” Appellant was denied an opportunity to fully develop the issue, and in light of the language in *Davis*, we find prejudice.

issues); *compare* Tr., Vol.1, p.16, L.18 - p.17, L.1 (the objection and offer to lay more foundation regarding the mental health issues).)

White, 97 Idaho at 713 n.6 (quoting *Davis*, 415 U.S. at 318 (abrogated on other grounds)) (other internal citations omitted).⁶

Mr. Sepulveda was given even less latitude than the defendant in *White*, although he, too, was ultimately allowed to present some evidence in that regard to the jury. (See, e.g., Tr., Vol.4, p.419, L.2 - p.421, L.17 (discussing the objections addressed at side bar that led to the testimony about L.M.'s drug use was determined to be admissible)); Tr., Vol.4, p.472, Ls.22-24 (the prosecutor arguing in her closing that L.M. had admitted to using methamphetamine a few days before the incident⁷).)

Nevertheless, the extent of L.M.'s drug use and the effect that use had on L.M.'s perception and motivations at the time of the fight, were the critical aspect of Mr. Sepulveda's theory of defense that were not presented to the jury. (See Tr., Vol.1, p.17, Ls.7-18.) Thus, the absence of such an opportunity to explore those "important credibility issue[s]" indicates the opportunity to cross-examination was not adequate. See *White*, 97 Idaho at 713. It was not full (the lines of examination were cut off), nor was it fair (the determination that the line of cross-examination was irrelevant was, as will be discussed further in Section II, wrong as a matter of law).

As a result, the use of L.M.'s preliminary hearing testimony at the trial was erroneous and violated Mr. Sepulveda's constitutional right to confrontation. Thus, his convictions based upon that improperly-presented testimony should be vacated.

⁶ The internal citation to *Davis* indicates that emphasis was added to the quote, but the WestLaw copy of the opinion does not provide that emphasis. See *White*, 97 Idaho 713 n.6.

⁷ It is unclear how the prosecutor justified arguing that fact to the jury when her objection, which actually overlapped L.M.'s answer (see State's exhibit 3 at 7:43-7:52), and which was sustained, was designed to prevent that precise evidence from being admitted based on the prosecutor's assertion that such evidence was in as irrelevant.

II.

The District Court Violated Mr. Sepulveda's Right To Present A Defense By Not Allowing Him To Present Evidence Challenging L.M.'s Credibility Based On Its Erroneous Conclusion That The Evidence Was Irrelevant

Two rulings existed during the trial that prevented Mr. Sepulveda from presenting evidence in support of his theory of defense – that L.M. had been using drugs which impacted her behavior such that, when Mr. Sepulveda had found evidence of that drug use and confronted L.M., she attacked him. The first was the ruling that cross-examination of L.M. as to her history of drug use was irrelevant (Tr., Vol.1, p.17, Ls.7-16) and the second was that the cause of L.M.'s death (overdosing on methamphetamine) was irrelevant (Tr., Vol.4, p.15, Ls.3-7). Both of those decisions are erroneous since a witness's history of drug use is relevant to the issues of bias and credibility. See, e.g., *Richardson*, 156 Idaho at 529; *Mantz*, 148 Idaho at 310-11.

A. As A Preliminary Matter, Mr. Sepulveda May Properly Challenge The Ruling On The State's Objection During L.M.'s Testimony As Though It Were An Evidentiary Ruling By The District Court

The unique facts surrounding L.M.'s "trial testimony" created a situation where the district court had to adopt, as a substantive ruling on the evidence, the magistrate's determination that cross-examining L.M. on her history of drug use was irrelevant. As such, Mr. Sepulveda may challenge the propriety of that ruling on appeal. See, e.g., *State v. DuVal*, 131 Idaho 550, 553 (1998).

L.M.'s preliminary hearing testimony was presented verbatim via an audio recording and was introduced for the truth of the matters asserted therein. Therefore, it was being heard as though it were live testimony, as was the district court's design. (Tr., Vol.3, p.51, L.6 - p.52, L.23.) Thus, the jury heard the question about L.M.'s history of drug use, as well as the State's relevancy objection. (See State's Exhibit 3.) In fact,

the prosecutor indicated that she would have raised that same objection had L.M. been giving live testimony at the trial. (Tr., Vol.3, p.33, Ls.12-13.) As a result, the district court would have had to rule on the State's objection as it would an objection raised during any other witness's testimony. Cf. 40 A.L.R.4th 514 (explaining that the general rule is that prior testimony admitted in lieu of live testimony is subject to all proper objections to admissibility at the trial which could have been raised at the time the testimony was given). As the only discussion was defense counsel's assertion at the preliminary hearing that the line of questioning was relevant (see Tr., Vol.1, p.17, Ls.12-13; see generally Tr., Vol.4, p.162, L.18 - p.163, L.24), the district court necessarily had to have adopted the magistrate's ruling on the State's objection as its own.

Though this appears to be an issue of first impression in Idaho, the conclusion that the district court can and did adopt the magistrate's decision as its evidentiary ruling on the matter is consistent with United States Supreme Court precedent in the related scenario of what authority a successor judge has vis-à-vis rulings made by the judge he succeeds on a particular case:

"As most commonly defined, the doctrine [of law of the case] posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case". . . . Colt is correct that the doctrine applies as much to the decisions of a coordinate court in the same case as to a court's own decisions. Federal courts routinely apply law-of-the-case principles to transfer decisions of coordinate courts.

Christianson v. Colt Industries Operating Corp., 486 U.S. 800, 815-16 (1988) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983) (dictum)) (other internal citations omitted). "Under this rule, a court should not reopen issues decided in earlier stages of the same litigation. The doctrine does not apply if the court is 'convinced that [its prior decision] is clearly erroneous and would work a manifest injustice.'" *Agostini v. Felton*,

521 U.S. 203, 236 (1997) (quoting *Arizona*, 460 U.S. at 618 n.8). Thus, as the Seventh Circuit has summarized:

The authority of a district judge to reconsider a previous ruling in the same litigation, whether a ruling made by him or by a district judge previously presiding in the case, . . . is governed by the doctrine of law of the case, which authorized such reconsideration if there is a compelling reason, such as a change in, or clarification of, law that makes clear that the earlier ruling was erroneous.

Santamarina v. Sears, Roebuck & Co., 466 F.3d 570, 571-72 (7th Cir. 2006); *see also Chiu v. United States*, 948 F.2d 711, 717-18 (Fed. Cir. 1991) (noting that the successor judge has the authority to review a decision by a prior judge in as much as the prior judge had authority to reconsider his own decisions).

Since the district court in this case had the authority to enter a different ruling on the State's objection, but did not do so, it impliedly entered the same ruling when the same objection was, in effect, raised again during L.M.'s "trial testimony."

B. The District Court Erred In Concluding The Evidence About L.M.'s History Of Drug Use Was Irrelevant

As defense counsel argued, the evidence of L.M.'s drug use was relevant to Mr. Sepulveda's theory of defense:

Well, Your Honor, there's other evidence that she, at the time of this incident, had methamphetamine in her system and other drugs that weren't prescribed to her. So it's a common theme that on our side that perhaps if she were here, we would [be] tempted to expose that. And so it does relate to this case, where she has a continued struggle with drug abuse, and that goes to the weight of her testimony.

(Tr., Vol.4, p.13, L.20 - p.14, L.4.) Additionally, Mr. Sepulveda had, from the outset, maintained that he had found L.M.'s drugs and paraphernalia, confronted her about those items, and been battered by L.M. as a result. (See, e.g., PSI, pp.127-28 (Officer Wudracki's report noting that was Mr. Sepulveda's primary account of the incident);

Tr., Vol.4, p.366, Ls.7-24 (Mr. Sepulveda explaining that he offered other suggestions in an effort to protect L.M. from arrest).)⁸ Therefore, part of his defense was that L.M. was the primary aggressor and her version of events was factually untrue.

To that point, the Idaho Supreme Court has held: “Evidence that goes to the credibility of the complaining witness is normally admitted under a broad standard.” *State v. Joy*, 155 Idaho 1, 13 (2013); *cf. White*, 97 Idaho at 713 (“This court has consistently held that where a defendant is seeking on cross-examination to show bias or test the credibility of the complaining witness, the trial court should allow considerable latitude.”). Thus, to have an adequate opportunity to cross-examine a witness, the defendant should be allowed to explore issues of credibility. *See, e.g., Richardson*, 156 Idaho at 529; *Mantz*, 148 Idaho at 310-11. That is particularly true in cases like this where there are directly inconsistent versions of events and the jury is called to decide which of the witnesses is credible.

However, the district court determined that the subject of L.M.’s source of a motive to lie was irrelevant. (Tr., Vol.1, p.17, Ls.7-16 (sustaining the prosecutor’s relevance objection to cross-examination on this point); Tr., Vol.4, p.15, Ls.3-7 (“the cause of death just doesn’t have anything to do with anything in term of Mr. Sepulveda’s guilt or innocence of the charges against him.”).) However, those decisions were

⁸ As Officer Chally testified, it is not uncommon for victims of domestic abuse to not disclose facts to police in an effort to protect their significant other. (Tr., Vol.4, p.227, Ls.3-7.) While she was offering this testimony to explain the inconsistencies in L.M.’s statements to police, it applies with equal force to Mr. Sepulveda’s alleged inconsistent statements. In fact, as Officer Chally testified, she was preparing to arrest L.M. when L.M.’s story changed. (Tr., Vol.4, p.212, Ls.4-8.) Combined with the fact that Mr. Sepulveda’s story has stayed relatively consistent in regard to the impetuosity of the fight, and the fact that the jury specifically asked if Mr. Sepulveda could be guilty if his actions against L.M. were made to **defend himself** (Tr., Vol.4, p.483, Ls.9-12), the record actually indicates that Mr. Sepulveda’s account of the fight and its impetuosity was the more credible of the varying accounts presented to the jury.

contrary to Idaho Supreme Court precedent: “The partiality of a witness is subject to exploration at trial, and is ‘**always relevant**’ as discrediting the witness and affecting the weight of his testimony.” *White*, 97 Idaho at 713 (quoting “3A J. Wigmore, Evidence s 940, p.775 (Chadbourn rev. 1970)”) (emphasis added). The facts about L.M.’s drug use and the impact on her behavior give her a motive to lie to protect herself. That makes it more likely that L.M.’s version of events was inaccurate, and thus, more likely that Mr. Sepulveda’s version of events was accurate. Under his version of events, he was the victim (*i.e.*, not guilty). Thus, the extent of L.M.’s drug use and its impact on her behavior are relevant to the question of Mr. Sepulveda’s guilt or innocence.

Additionally, the fact that the overdose occurred after the events in questions does not make that information irrelevant in this case; it is still relevant to the nature of L.M.’s drug use and the impact it had on her behavior, and so, builds on her motive to lie to try to protect herself. It is important to remember here that the threshold for relevancy is low. See, *e.g.*, *Joy*, 155 Idaho at 9 (discussing I.R.E. 401). This conclusion is particularly evident in this case, since the district court ruled the State could inquire about incidents occurring after the incident in question to try to refute the evidence tending to impeach L.M. offered by her counselor. (Tr., Vol.4, p.319, Ls.5-16.)

Thus, by not allowing Mr. Sepulveda to present this evidence of L.M.’s history of drug use and way it impacted her behavior prevented him from fully presenting his defense to the jury. As such, his due process right to present a defense was violated. The right to present a defense, which includes offering testimony of witnesses and presenting the defense’s version of the facts so that the jury “may decide where the truth lies” is a “fundamental element of due process of law.” *State v. Meister*, 148 Idaho 236, 239 (2009) (quoting *Washington v. Texas*, 388 U.S. 14, 19 (1967)). The

Rules of Evidence govern the admission of such evidence. *Id.* at 241. Thus, a defendant does not have a right to present irrelevant information, and there may also be cases, such as those arising under I.R.E. 412, where he will not have the right to present otherwise-relevant information. *Id.* However, the general rule is that the defendant “should be afforded the opportunity to present his complete and full defense, which includes the presentation of all relevant evidence in the context of trial pursuant to any limitations of the Idaho Rules of Evidence.” *Id.*

In this case, Mr. Sepulveda was seeking to present relevant evidence – namely, evidence that L.M.’s version of events was false and that her credibility should be questioned. Since evidence of a witness’s credibility is relevant under a broad standard, Mr. Sepulveda should have been allowed the opportunity to present his full defense, which included presenting this evidence challenging L.M.’s credibility, at the trial. *See Joy*, 155 Idaho at 13; *White*, 97 Idaho at 713.

To this point, this case is similar to *State v. Karpach*, wherein the Court of Appeals determined that the defendant had been deprived of his rights in presenting his defense when the district court’s rulings prevented him from calling a witness and admitting documents which were both relevant to contradict the evidence offered by the State’s only eyewitness.⁹ *State v. Karpach* 146 Idaho 736, 739-41 (Ct. App. 2009) (called into question on other grounds by *State v. Wilson*, 158 Idaho 585, 589 n.2

⁹ The Court of Appeals’ analysis was focused primarily on the right to offer testimony which is grounded in the Compulsory Process Clause. *See Karpach*, 146 Idaho at 739. However, the analysis in that decision is still relevant since it was also addressing the decision to prevent the defendant from presenting documents which would fall under the business records exception to the hearsay rule (I.R.E. 803(6)). *Id.* at 740-41. Thus, it is representative of appropriate analysis as identified by the Idaho Supreme Court in *Meister*, which is to determine the admissibility of evidence under the Rules of Evidence, and allow the defendant to present a full defense accordingly. *Meister*, 148 Idaho at 241.

(Ct. App. 2015)). Similarly, Mr. Sepulveda was seeking to present evidence contradicting the testimony of the only eyewitness. Thus, the district court's decisions which prevented him from presenting that evidence prevented him from presenting his defense in violation of his constitutional rights. Therefore, his convictions obtained in violation of those rights should be vacated.

III.

The District Court Violated Mr. Sepulveda's Constitutional Right To Be Free From Double Jeopardy Under The Idaho Constitution By Entering Convictions And Imposing Sentences For Each Charge In The 2014 Case When One Of Those Charges Was Alleged As The Means By Which Each Of The Other Two Charges Was Committed

A. The Idaho Courts Apply The Pleading Theory Analysis To Claims Of Double Jeopardy Violations Arising Under The Idaho Constitution

The Idaho Constitution contains a prohibition of double jeopardy that is co-extensive in scope with the prohibition in the United States Constitution. *State v. McKeeth*, 136 Idaho at 619, 624 (Ct. App. 2001). Thus, the protections provided under each constitution may be violated in three ways: (1) engaging in a second prosecution for the same offense after an acquittal has been entered; (2) engaging in a second prosecution for the same offense after a conviction has been entered; or (3) imposing multiple punishments for the same offense. *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980); *McKeeth*, 136 Idaho at 622.

However, while the scope of the two rights may be co-extensive, Idaho employs its own test under its constitution for determining whether two charges are, in fact, for the same offense. See, e.g., *State v. McKinney*, 153 Idaho 837, 841 (2013); *State v. Moad*, 156 Idaho 654, 658 n.3 (Ct. App. 2014). Under the federal constitution, the courts use the "statutory theory" of analysis derived from *Blockburger v. United*

States, 284 U.S. 299 (1932). Under that approach, the courts analyze the statutory elements of the two alleged crimes and determine whether each contains an element that the other does not. *Id.* at 304. If there is not that bilateral uniqueness, then a conviction for both offenses will violate the federal protection against double jeopardy. *Id.*

However, under Idaho's "pleading theory," the courts analyze the charging document to determine whether one of the charges is "necessarily committed in the commission of another offense; or one, the essential elements of which are charged in the information as the manner or means by which the offense was committed."¹⁰ *State v. Thompson*, 101 Idaho 430, 434 (1980) (quoting *State v. Hall*, 86 Idaho 63, 69 (1963)). Thus, as the Court of Appeals has explained, a double jeopardy violation would occur under *Thompson* in a case where the defendant was charged with eluding and reckless driving when "[t]he means by which Corbus eluded the police—driving in excess of 100 mph, passing other vehicles, turning off his headlights after sunset, and endangering the person or property of another—are the same means by which Corbus drove recklessly." *State v. Corbus*, 151 Idaho 368, 375 (Ct. App. 2011).

In *Corbus*, the Court of Appeals determined that the defendant, though showing a violation under *Thompson*, had failed to show fundamental error because the law in terms of the proper application of *Thompson* was in doubt due to conflicting Idaho Supreme Court precedent.¹¹ See *id.* at 375-76. However, since *Corbus*, that question

¹⁰ The United States Supreme Court identifies the constitutional floor; states are allowed to provide additional protections under their own constitutions. See, e.g., *State v. Donato*, 135 Idaho 469, 471 (2001) (discussing this concept as it relates to the Fourth Amendment).

¹¹ A defendant may raise an issue for the first time on appeal as fundamental error if he shows (1) the error violated an unwaived constitutional right, (2) the error is clear from

has been settled. Notably, the Idaho Supreme Court strictly applied the *Thompson* pleading theory in *McKinney*, 153 Idaho at 841. See also *State v. Moffat*, 154 Idaho 529, 532 n.2 (Ct. App. 2013) (noting that this distinction was recognized by the Idaho Supreme Court in *State v. Flegel*, 151 Idaho 525, 529 (2011)). Thus, the Court of Appeals has explained:

In a subsequent case, however, the Idaho Supreme Court has again applied the *Thompson* pleading test to a double jeopardy claim arising under the Idaho Constitution, without mentioning the statutory elements test. As *McKinney* is the Idaho Supreme Court's most recent pronouncement on the issue and reiterated only the pleading theory following this Court's explication of the confusion in Idaho law on the subject, we conclude that it is only the pleading theory that is to be applied in addressing a double punishment claim under the Idaho Constitution.

Moad, 153 Idaho at 658 n.3 (internal citations omitted); cf. *Moffat*, 154 Idaho at 532 n.2. The continuing validity of the *Thompson* test is also evident from the Idaho Supreme Court's subsequent decision in *State v. Sanchez-Castro*, where the Court analyzed the defendant's double jeopardy claim under both constitutions under both the *Blockburger* statutory theory and the *Thompson* pleadings theory. See *State v. Sanchez-Castro*, 157 Idaho 647, 648-49 (2014).

B. The Violation Of Mr. Sepulveda's Right To Be Free From Double Jeopardy Rises To The Level Of Fundamental Error

In this case, Mr. Sepulveda contends that the Idaho Constitution's protections against double jeopardy were violated by the duplicative convictions in the 2014 case. He also contends that this violation rises to the level of fundamental error.

As in *Corbus*, the language in the charging document demonstrates that the means by which the Information alleged the intimidating the witness charge was the

the record, and (3) there is a reasonable possibility the error was not harmless. *State v. Perry*, 150 Idaho 209, 226 (2010).

same as the means for each of the other two charges.¹² Therefore, there is a violation of one of Mr. Sepulveda's unwaived constitutional rights. Specifically, the intimidating a witness charge alleged Mr. Sepulveda had attempted intimidated or influenced L.M. from testifying in the 2013 case¹³ "by asking another person and/or persons to speak with [L.M.] and ask her to tell the court that she injured herself, that the allegations of attempted strangulation are false, and/or that her medications are to blame for what happened, and/or to direct her not to appear for court." (R., p.278.) Similarly, Count II alleged Mr. Sepulveda attempted to violate the no contact order "by calling [L.M.]'s sister and asking her to pass certain messages on to [L.M.]" (R., p.278.) Likewise, Count III alleged Mr. Sepulveda attempted to violate the no contact order "by calling a Lisa Cameron and asking her to contact [L.M.] on his behalf." (R., p.278.) As such, the means by which the intimidating the witness charge was alleged was the same as each of the charges alleging an attempt to violate the no contact order – contacting a person

¹² To avoid confusion, Mr. Sepulveda is not claiming that the two charges alleging attempt to violate the no contact order overlap with each other. Rather, Count I (the intimidating a witness charge) overlaps with Count II, and Count I overlaps separately with Count III. In both instances, Mr. Sepulveda's right to be free from double jeopardy is violated.

¹³ The information originally charged included language indicating it was an attempt to intimidate that was being charged. (See R., p.278.) However, the district court subsequently struck that language from the Information based on the fact that the attempt language has been removed from the statute. (See Tr., Vol.3, p.47, L.10 - p.48, L.13.) As the Idaho Supreme Court has explained, "it is the defendant's actions combined with an intent to intimidate a witness in a criminal proceeding, *not* the effect on the witness, that constitutes the crime. . . . There is no requirement that the defendant is ultimately successful in his efforts." *State v. Mercer*, 143 Idaho 108, 110 (2006). Thus, the intimidation statute effectively includes attempts to intimidate, as Mr. Sepulveda was charged with doing. (See R., p.278.)

and asking them to contact L.M. on the defendant's behalf.¹⁴ *Compare Corbus*, 151 Idaho 374-75.

As pled, Mr. Sepulveda is alleged to have attempted to violate the no contact order in two instances, each time by trying to influence L.M.'s testimony. (R., p.278.) Thus, the intimidating charge is the means by which each attempt to violate the no contact order charges were committed. As a result, the duplicative punishment for the intimidating a witness charge violated the Idaho Constitution's protection against double jeopardy. *Compare Corbus*, 151 Idaho at 374-75. There is no evidence in the record that Mr. Sepulveda waived his right to be free from double jeopardy. (See generally R., Tr.) Therefore, as in *Corbus*, he has satisfied the first prong of the *Perry* fundamental error test.

¹⁴ The fact that the articulated means in Count I is not identical to the language in either Count II or Count III is of no import. In *Corbus*, the Court of Appeals found a violation under *Thompson* even though the language in the two charges was not identical:

The information charging Corbus with eluding a police officer stated:

[Corbus] willfully attempted to elude a pursuing police vehicle after being given a visual signal to stop, and in so doing ... traveled ... in excess of 100 m.p.h. [or] ... drove his vehicle in a manner as to endanger or be likely to endanger the property of another or the person of another, to-wit: the Defendant drove in a reckless manner including speeding in excess of 100 m.p.h., passing other vehicles, and turning off his headlights after sunset

The information charging Corbus with reckless driving stated:

[Corbus drove] carelessly and heedlessly; without due caution and circumspection and/or at a speed or in a manner to be likely to endanger persons or property; by driving in excess of 100 m.p.h. with his headlights turned off after 9:18 p.m., with other vehicles on the roadway. . . .

Corbus, 151 Idaho at 375. Thus, where the charging document articulates the same overarching means, even if a different level of specificity existed as to the facts of individual charges, there is still a violation under *Thompson*. See *id.*

As discussed in depth *supra*, the law regarding the continued applicability of the *Thompson* pleading test is now clear – the *Thompson* pleading theory controls the analysis under the Idaho Constitution’s protection against double jeopardy. See, e.g., *Moad*, 153 Idaho at 658 n.3. The facts of the error, also discussed in depth *supra*, are also clear – the Information alleges multiple crimes based on the same means, which is improper under *Thompson*. Thus, the error is clear from the record, and so, Mr. Sepulveda has satisfied the second prong of the *Perry* analysis.

Finally, in the double jeopardy context, the harm caused by the violation is self-evident. In this case, Mr. Sepulveda has three convictions on his record, one of them a felony, for the same criminal activities. That, by itself, shows the harm. However, the harm caused by the violation is particularly evident in Mr. Sepulveda’s case because, as defense counsel pointed out at sentencing, Mr. Sepulveda is facing potential deportation as a result of the felony conviction in this case. (Tr., Vol.4, p.511, Ls.20-24.) Therefore, the harm caused by the unconstitutionally-duplicative convictions in the 2014 case is exponentially greater in this case than in the traditional double jeopardy scenario. As a result, Mr. Sepulveda has satisfied the third prong of the *Perry* analysis.

As such, Mr. Sepulveda has shown the violation of his Idaho Constitutional right to be free from double jeopardy constitutes fundamental error.

C. Remedy

Therefore, since the intimidating a witness charge was the means by which each of the two attempt to violate the no contact order charges were committed, it should be subsumed into those convictions, and thus, the conviction for intimidating a witness should be vacated. See *Thompson*, 101 Idaho at 436 (affirming the order dismissing the included charge).

IV.

The Accumulated Errors In This Case Require Reversal Even If This Court Determines Them To Be Individually Harmless

Even if this Court determines that each of the errors discussed *supra* was harmless by itself, this Court should still vacate Mr. Sepulveda's convictions based on the accumulation of errors.¹⁵ See, e.g., *State v. Field*, 144 Idaho 559, 572-73 (2007). The accumulation of independently-harmless errors may still deprive the defendant of his right to a fair trial. *Id.* In those situations, the convictions should still be vacated pursuant to the cumulative error doctrine. See *Field*, 144 Idaho at 572-73. In order to find cumulative error, the appellate court must first find more than one instance of error. *State v. Sheahan*, 139 Idaho 267, 287 (2003). Additionally, "[e]rrors in the admission of evidence will be deemed harmless if the appellate court is able to say, beyond a reasonable doubt, that the jury would have reached the same result absent the errors."¹⁶ *Id.*

¹⁵ As to the violation of the protection against double jeopardy argued under the fundamental error doctrine, see Section III, *supra*, "alleged errors at trial, that are not followed by a contemporaneous objection, will not be considered under the cumulative error doctrine unless said errors are found to pass the threshold analysis under [the] fundamental error doctrine." *State v. Parker*, 157 Idaho 132, 149 (2014) (quoting *Perry*, 150 Idaho at 230)). However, even if the arguments made under the fundamental error framework are not subject to the cumulative error analysis, the two errors that were preserved for appellate review, see Sections I-II, *supra*, are properly reviewed for cumulative error.

¹⁶ Considering whether the verdict would have been the same "absent the errors" is not technically an accurate description of the relevant analysis. See, e.g., *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993); *State v. Thomas*, 157 Idaho 919 (2014). As the United States Supreme Court has explained:

The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict in *this* trial was surely unattributable to the error. This must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.

This case is like *Field* in the application of the cumulative error doctrine. In *Field*, the Supreme Court found several instances of independently-harmless prosecutorial misconduct but which, when aggregated with other errors found on appeal, were not harmless. *Field*, 144 Idaho at 571-73. Therefore, it reversed the judgment of conviction. *Id.* at 572-73. Similarly, in this case, there are several instances of error, and there is a reasonable probability that the accumulated errors contributed to the Mr. Sepulveda's convictions. This is particularly true in regard to the conviction for domestic battery because the jury was apparently inclined to believe Mr. Sepulveda's version of events, in that L.M. was the primary aggressor, but was unable to fully discount her version of events. (See Tr., Vol.4, p.483, Ls.9-12.) Thus, there is a reasonable possibility that the combined effect of allowing L.M.'s insufficiently-challenged testimony, along with the inability to present evidence of the extent and impact of L.M.'s history of drug use contributed to the jury's decision to convict despite partially believing Mr. Sepulveda's version of events.

As a result, even if all those errors are found to be independently harmless, this Court should still vacate the judgment of conviction and remand this case for a new trial because the accumulated errors deprived Mr. Sepulveda's of his right to a fair trial.

Sullivan, 508 U.S. at 279. If the State does not prove beyond a reasonable doubt that there was no such possibility, then the error was not harmless. *Id.*; see also *State v. Whitaker*, 152 Idaho 945, 953 (Ct. App. 2012) (applying the harmless error test's rationale while evaluating a case for cumulative error).

CONCLUSION

Mr. Sepulveda respectfully requests this Court vacate his convictions and remand these cases for further proceedings.

DATED this 17th day of September, 2015.


for BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 17th day of September, 2015, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

CESAR ANTONIO SEPULVEDA
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7458 W TOTTENHAM LN APT #102
BOISE ID 83704

JASON D SCOTT
DISTRICT COURT JUDGE

DAVID A STEWART
ADA COUNTY PUBLIC DEFENDER
E-MAILED BRIEF

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Hand delivered to Attorney General's mailbox at Supreme Court.

A handwritten signature in black ink, appearing to read 'Evan A. Smith', with a stylized flourish at the end.

EVAN A. SMITH
Administrative Assistant

BRD/eas